146 US 60

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1889.

No. 339. ~~49~~ ~~11~~ 4

ALFRED EARNSHAW, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

FILED JUNE 21, 1887.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1889.

No. 339.

ALFRED EARNSHAW, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

INDEX.

	Original.	Print.
Writ of error	1	1
Citation and acceptance of service	1¼	1
Caption	1½	2
Transcript from district court	3	2
Summons	4	2
Marshal's return	5	3
Narr.	6	3
Plea	12	6
Jury	12	6
Verdict	13	6
Plaintiff's points	13	6
Agreement as to point reserved	14	6
Motion for judgment *non obstante veredicto*	14	7
Motion and reasons for new trial	15	7
Opinion granting new trial	15	7
Order for jury	15	7
Jury	16	7
Verdict	16	7
Defendant's points	17	8
Motion for judgment *non obstante veredicto*, &c.	18	8

JUDD & DETWEILER, PRINTERS, WASHINGTON, OCTOBER 18, 1889.

	Original.	Print.
Opinion denying new trial	18	8
Judgment	19	9
Bill of exceptions	19	9
Table showing amount at which the cargoes were entered, &c.	22	10
General appraiser's notice, March 18, 1884	24	11
Letter of Earnshaw to general appraiser, March 19, 1884	25	11
Telegram of United States general appraiser to Earnshaw, March 19, 1884	25	11
Demand for payment, May 10, 1884	26	12
Appeal to Secretary of Treasury, May 14, 1884	27	12
Letter to Secretary of Treasury, June 7, 1884	29	13
Letter of Assistant Secretary of Treasury, June 12, 1884	31	14
Letter of Secretary of Treasury, July 11, 1884	31	14
Letter to Secretary of Treasury, July 14, 1884	34	15
Letter of Acting Secretary of the Treasury, July 26, 1884	35	15
Extracts from Treasury Regulations	37	16
Defendant's requests	38	16
Instructions	39	17
Assignment of errors	41	18
Bond on writ of error	42	18
Clerk's certificate	45	20
Writ of error	46	20
Citation	48	21
Judgment	50	21
Bond	51	21
Clerk's certificate	53	22
Assignment of errors	54	23

1 UNITED STATES, *Eastern District of Pennsylvania,* } *sct:*

The President of the United States to the judges of the circuit court of the United States in and for the eastern district of Pennsylvania, Greeting:

Because that in the record and process, and also in the rendering of judgment in a suit before you, between Alfred Earnshaw, plaintiff in error, and The United States of America, defendant in error, in a plea of trespass on the case, a manifest error has intervened to the great damage of the said Alfred Ernshaw, as in his complaint has been stated, and as it is just and proper that the error, if any there be, should be corrected in due manner, and that full and speedy justice should be done to the parties aforesaid in this behalf, you are hereby commanded that if judgment thereof be given, then, under your seal, you do, distinctly and openly, send the record and process in the suit aforesaid, with all things concerning them and this writ, so that you have the same before the honorable the justices of the Supreme Court of the United States, sitting at Washington, D. C., on the second Monday of October next, that, the record and process aforesaid being inspected, they may cause to be done thereupon what of right ought to done.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, at Philadelphia, this sixth day of June, A. D. one thousand eight hundred and eighty-seven, and in the one hundred and eleventh year of the Independence of the said United States.

Seal U. S. Circuit Court, E. D. Pennsylvania.

SAMUEL BELL,
Clerk of Circuit Court U. S.

1¼ UNITED STATES OF AMERICA, *ss:*

To the United States of America, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the eastern district of Pennsylvania, in the third circuit, wherein Alfred Earnshaw is plaintiff and you are defendant in error, to show cause, if any there be, why the judgment rendered against said plaintiff in error, as in said writ of error mentioned, shall not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness my hand this 10 day of June, in the year of our Lord one thousand eight hundred and eighty-seven.

WM. BUTLER, *Judge.*

I accept se-vice of the above writ.

JOHN K. VALENTINE,
Att'y for U. S.

6, 11, '81.

1½ In the Circuit Court of the United States in and for the Eastern District of Pennsylvania, in the Third Circuit.

ALFRED EARNSHAW, Plaintiff in Error,
vs.
THE UNITED STATES, Defendant in Error.

UNITED STATES OF AMERICA,
Eastern District of Pennsylvania, } *ss:*

Pleas and proceedings before the honorable the judges of the circuit court of the United States in and for the eastern district of Pennsylvania, in the third circuit, of April session, 1887, No. 12.

It is thus contained:

Be it remembered that on the twenty-fifth day of April, in the year of our Lord one thousand eight hundred and eighty-seven,
2 Alfred Earnshaw, by his attorney, Richard C. McMurtrie, Esquire, comes into court here and sues forth therefrom a writ of error to the district court of the United States in and for the eastern district of Pennsylvania against the United States, which, with the endorsement and return thereto, is in the words and figures following, to wit:

3 In the District Court of the United States for the Eastern District of Pennsylvania, of August Sessions, 1884. No. 23.

Pleas before the Honorable the Judge of said Court.

It is thus contained:

THE UNITED STATES OF AMERICA
vs.
ALFRED EARNSHAW. } Summons Case.

Be it remembered that on the 30th day of August, A. D. 1884, upon præcipe filed by John K. Valentine, Esq., attorney of the United States for the eastern district of Pennsylvania, a writ of summons case issued, which, with the return of the marshal thereto, is in the words and figures following, to wit:

4 UNITED STATES,
Eastern District of Pennsylvania, } *ss:*

The President of the United States to the marshal of the eastern district of Pennsylvania, Greeting:

We command you that you summon Alfred Earnshaw, late of

your district, if he may be found therein, so that he be and appear before the judge of the district court of the United States for the eastern district of Pennsylvania, at a session of the same court to be holden at Philadelphia on the first Monday of September next, to answer to — of a plea of trespass on the case, &c.; and have you then there this writ.

Witness the Honorable William Butler, judge of said court, at Philadelphia, this — day of August, A. D. 1884, and in the one hundred and 9th year of the Independence of the United States.

[SEAL.] W. W. CRAIG,
Pro. Clerk of District Court.

(Marshal's return endorsed:)

5 Aug. 30, 1884, served the within writ on Alfred Earnshaw by giving him a true and attested copy of the same & making known the contents thereof to him.

So answers—

JAMES N. KERNS,
U. S. Marshal,
Per THOS. MARPLE, *Deputy.*

[Endorsed:] No. —. Sessions, 18—. U. S. district court. —— —— *vs.* —— ——. Summons. Returnable on the — Monday of —— next. —— ——, attorney for plaintiff.

And afterwards, to wit, on the 16th day of September, A. D. 1884, John K. Valentine, Esq., attorney as aforesaid, declares against the said Alfred Earnshaw in the plea aforesaid in the words and figures following, to wit:

6 In the District Court of the United States for the Eastern District of Pennsylvania, of August Sessions, 1884. No. 23.

EASTERN DISTRICT OF PENNSYLVANIA, *ss:*

Alfred Earnshaw, defendant, late of the district aforesaid, was attached to answer The United States of America, plaintiff, of a plea of trespass on the case upon premises; and thereupon said plaintiffs, by their attorney, John K. Valentine, Esquire, complain and say for that whereas heretofore, to wit, on April 17th, 1884, the said defendant was indebted unto said plaintiffs in the sum of nine dollars and sixty cents, lawful money, etc., being the amount of customs duties and the penalty thereon theretofore assessed and liquidated by the said United States upon custom merchandise, to wit, iron ore, theretofore, to wit, on September 2, 1882, imported into the United States at the port of New York, in the State of New York, by the said defendant on the bark "Vittoria."

2. And whereas also the said defendant, on the said April 17th, 1884, was further indebted unto said plaintiff in the further sum of seventy-four dollars and forty cents, lawful money, etc., being the

amount of customs duties and the penalty thereon theretofore assessed and liquidated by the said United States upon certain iron ore theretofore, to wit, on October 14, 1882, imported into the United States at the port of New York, in the State of New York, by the said defendant in the steamer "Chateau Lafitte."

3. And whereas also the said defendant, on the said April 17th, 1884, was further indebted unto said plaintiffs in the further sum of two hundred and thirteen dollars and twenty cents, lawful money, etc., being the amount of customs duties and the penalty thereon theretofore assessed and liquidated by the said United States upon certain merchandise, to wit, iron ore, theretofore, to wit, on July 18th, 1882, imported into the United States by the said defendant at the port of New York, in the State of New York, in the steamship "Roxbury Castle."

4. And whereas also the said defendant, on the said April 17th, 1884, was further indebted unto said plaintiffs in the further sum of eighty-two dollars and eighty cents, lawful money, etc., being the amount of customs duties and the penalty thereon theretofore assessed and liquidated by the said United States upon certain merchandise, to wit, iron ore, theretofore, to wit, on November 20th, 1882, imported into the United States at the port of New
8 York, in the State of New York, in the steamship "Liscard."

5. And whereas also the said defendant, on the said April 17th, 1884, was further indebted unto said plaintiffs in the further sum of one hundred and seventy-eight dollars and twenty cents, lawful money, etc., being the amount of customs duties and the penalties thereon theretofore assessed and liquidated by the said United States upon certain merchandise, to wit, iron ore, theretofore, to wit, on June 16, 1882, imported into the United States at the port of New York, in the State of New York, in the steamship "Chateau Lafitte."

6. And whereas also the said defendant, on the said April 17th, 1884, was further indebted unto said plaintiffs in the further sum of three hundred and two dollars and forty cents, lawful money, etc., being the amount of customs duties and the penalty thereon theretofore assessed and liquidated by the said United States upon certain merchandise, to wit, iron ore, theretofore, to wit, on August 5th, 1882, imported by the defendant into the United States at the port of New York, in the State of New York, in the steamship "Endymion."

7. And whereas also the said defendant, heretofore, to wit,
9 on the said April 17th, 1884, was further indebted unto the said plaintiffs in the further sum of thirty-five dollars and forty cents, lawful money, etc., being the amount of customs duties and the penalty thereon theretofore assessed and liquidated by the said United States upon certain merchandise, to wit, iron ore, theretofore, to wit, on July 8th, 1882, imported by the defendant into the port of New York, in the State of New York, in the bark "Cesarina."

8. And whereas also the said defendant heretofore, to wit, on April

17th, 1884, was further indebted unto the said plaintiffs in the further sum of nineteen dollars and eighty cents, lawful money, etc., being the amount of customs duties and the penalty thereon theretofore assessed and liquidated by the said United States upon certain merchandise, to wit, iron ore, theretofore, to wit, on September 28th, 1882, imported by the defendant into the port of New York, in the State of New York, iron ore, theretofore, to wit, in the bark "Rosa Donovan."

9. And whereas also the said defendant, on the said April 17th, 1884, was further indebted unto said plaintiff in the further sum of two hundred and nine dollars and sixty cents, lawful money, etc., being the amount of customs duties and the penalty thereon theretofore assessed and liquidated by the said plaintiffs upon certain merchandise, to wit, iron ore, theretofore, to wit, on August 15th, 1882, imported by the said defendant into the port of New York, in the State of New York, in the steamship "Caduceus."

10. And whereas also the said defendant, on the said April 17th, 1884, was further indebted unto said plaintiffs in the further sum of one hundred and five dollars and forty cents, lawful money, etc., being the amount of customs duties and the penalty thereon theretofore assessed and liquidated by the said United States upon certain merchandise, to wit, iron ore, theretofore, to wit, on July 21st, 1882, imported by the defendant into the port of New York, in the State of New York, in the steamship "Teutonia."

11. And whereas also the said defendant, afterwards, to wit, on the said April 17th, 1884, was indebted unto said plaintiffs in the sum of three hundred and eighty dollars and forty cents, lawful money, etc., being the amount of customs duties and the penalty thereon theretofore assessed and liquidated by the said United States upon certain merchandise, to wit, iron ore, theretofore, to wit, on July 31st, 1882, imported by the defendant into the port of New York, in the State of New York, in the steamship "Saint Romans."

And the said defendant, afterwards, to wit, on the day and year aforesaid, at the district aforesaid, in consideration of the premises, then and there promised to pay unto the said plaintiffs the said several last-mentioned sums of money in request.

Yet the said defendant hath disregarded his promises, and has not paid any of said moneys or any part thereof unto said plaintiffs or otherwise, to the damage of said plaintiffs five thousand dollars, and therefore they bring their suit.

JOHN K. VALENTINE,
U. S. Attorney.

Enter rule upon the above defendant to plead in eight days of judgment, *sec. reg.*

JOHN K. VALENTINE,
Per H. G.,
U. S. Attorney.

Sept. 16th, 1884.

12 And afterwards, to wit, on the 20th day of October, A. D. 1884, the said Alfred Earnshaw makes his plea in the words and figures following, to wit:

The defendant in the above suit pleads "non-assumpsit."

R. C. McMURTRIE,
Att'y for Def't.

10, 84, 20.

And afterwards, to wit, on the second day of March, A. D. 1885, it is ordered that a jury come and try the issue in this case.

And thereupon, on the same day, come the parties aforesaid, by their attorneys aforesaid, and the jurors of the jury aforesaid, being called, likewise come, to wit: 1, Thos. W. Bailey; 2, John C. Browne; 3, David Carrick; 4, Jacob Harley; 5, Wm. F. Jones; 6, Charles Kuhn; 7, Jas. M. Tatem; 8, Rob't W. Jackson; 9, Harry Mears; 10, R. Crosby Fairlamb; 11, Henry Faucit; 12, George Little, who are duly empaneled, returned, chosen, tried, and sworn or affirmed to speak the truth in the issues joined in this cause between The United States of America, plaintiff, and Alfred
13 Earnshaw, defendant.

And afterwards, on the same day, the jurors aforesaid, upon their oaths and affirmations aforesaid, do say that in the issue joined in this cause they find for the defendant, and the verdict is ordered by the court to be recorded, subject to the opinion of the court upon certain points for charge this day presented by the plaintiffs and reserved by the court and ordered to be filed, and upon the agreement of the defendant in writing, also presented and ordered to be filed, and said points for charge and agreement being filed are in the words and figures following, to wit:

THE UNITED STATES
vs.
ALFRED EARNSHAW. } D. C., U. S. 23. Aug. Sess., 1884.

Plaintiff's Points.

The plaintiff requests the judge to charge as follows:

1. That under the evidence in this case your verdict should be for the plaintiff for $1,611.20.

2. That as there was a merchant appraisement in this case
14 this appraisement was final and conclusive in the absence of fraud, and the defendant cannot be allowed to give the facts in evidence.

3. That as there was no payment by the defendant he cannot in this form of action be allowed to go into the facts of the case.

(*Agreement of Defendant.*)

The defendant agrees that the point may be reserved whether the fact is material in point of law that he was not permitted to be heard

or produce evidence before the merchant appraiser, and if the court shall consider that this fact is not material the verdict may be set aside and a verdict entered for the plaintiff for the amount claimed by the U. S.

R. C. McMURTRIE,
For Def'd't.

And afterwards, to wit, on the third day of March, A. D. 1885, come the plaintiffs, by their attorney, John K. Valentine, Esquire, and move the court that judgment be entered for the plaintiff and against the defendant, *non obstante veredicto*, on the points for charge and agreement aforesaid, and the cause is heard upon said
15 motion and is *agreed* by the counsel for the respective parties, plaintiff and defendant.

And afterwards, to wit, on the 6th day of March, A. D. 1885, comes John K. Valentine, Esquire, attorney for the United States, and moves the court for a new trial, and assigns the following reasons:

1. That under the evidence in the case the verdict should have been for the plaintiff.

2. That under the defendant's point and agreement the real point in the case was not involved so as to enable the court properly to decide the case.

And, on the same day, the opinion of the court, being filed, is in the words and figures following, to wit:

The court being of opinion that the point in the case is not involved in the point reserved as stated in the agreement filed by defendant under which the cause was submitted to the jury, a new trial is granted.

And afterwards, to wit, on the 24th day of November, A. D. 1886, it is ordered that a jury come and try the issue in this case.
16 And thereupon, on the same day, come the parties aforesaid, by their attorneys aforesaid, and the jurors of the jury aforesaid, being called, likewise come, to wit: 1, Edward R. Joline; 2, George N. Kline; 3, Wm. P. Elwell; 4, Aaron Hofford; 5, John P. Ilsey; 6, Michael Riley; 7, John Clouds; 8, J. Catherwood Robinson; 9, Andreas Hartel; 10, Thomas G. Wyatt; 11, James Flanagan; 12, Harmon Nauman, who are duly impanelled, returned, chosen, tried, and sworn or affirmed to speak the truth in the issue joined in this cause between The United States of America, plaintiff, and Alfred Earnshaw, defendant.

And afterwards, on the same day, the jurors aforesaid, upon their oaths and affirmations, do say that in the issue joined in this cause they find for the plaintiffs, and they assess the damages at the sum of one thousand seven hundred and fifty-six dollars and twenty cents, together with six cents costs, and the verdict is ordered by the court to be recorded, subject to the opinion of the court upon the points for charge this day presented by the defendant and reserved by the

court and ordered to be filed; and the said points for charge
17 being filed are in the words and figures following, to wit:

U. S.
vs.
EARNSHAW. } D. C., U. S.

Defendant's Points.

1. The defendant asks the court to instruct the jury, if the defendant attended on the day appointed for the appraisement by the merchant appraisers and the United States not being ready to go on and the hearing was postponed indefinitely, the defendant was entitled to such reasonable notice of the time and place of holding the appraisement as would enable him to attend.

2. If the United States failed to move in the matter after the adjournment June, 1883, until March, 1884, and the defendant was then temporarily absent from home, he was entitled to a reasonable time to enable him to return and attend at the appraisement.

3. If the United States insisted on the proceeding with the re-appraisement in the absence of the defendant under the circum-
18 stances as shown by the testimony the re-appraisement is not a valid merchant's appraisement.

And on the same day the defendant, by his attorney, Richard C. McMurtrie, Esquire, comes and moves the court that judgment be entered for the defendant *non obstante veredicto* on the points for charge aforesaid, and also moves that a new trial be granted.

And afterwards, on the 18th day of April, A. D. 1887, the cause is heard by the court on said motion and is argued by the counsel for the respective parties, plaintiff and defendant.

And afterwards, to wit, on the 19th day of April, the opinion of the court being filed, is in the words following, to wit:

UNITED STATES
vs.
ALFRED EARNSHAW. }

The defendant's only substantial ground of complaint is the appraisers' refusal to adjourn the hearing until a future time.
19 Proper notice was sent him, in pursuance of which his representative attended and requested an adjournment. This request was refused. Whether it should have been granted, the court cannot consider. The appraisers were the sole judges of this. I cannot assume that they abused their authority—acted arbitrarily—without the exercise of the discretion committed to them, and on this ground treat the appraisement as void. Judgment must therefore be entered on the verdict for the pl'ff.

And thereupon, on the same day, it is ordered, adjudged, and decreed that the plaintiff, The United States of America, do have and recover of the defendant, Alfred Earnshaw, the sum of one thou-

sand seven hundred and ninety-eight dollars and sixty-three cents, together with their costs by them in this behalf expended.

And afterwards, to wit, on the 25th day of April, A. D. 1887, a bill of exceptions tendered by the defendant and duly signed by the honorable the judge of the court here, and on the 25th day of May, 1887, an assignment of errors, with prayer for reversal of the judgment entered, being filed, are in the words and figures following, to wit:

20 Be it remembered that in the term of August, A. D. 1884, came the United States into the dist. court U. S. for the eastern district of Pennsylvania and impleaded Alfred Earnshaw in a certain plea of assumpsit, &c., in which the said plaintiff declared (*prout narr.*) and the said defendant pleaded (*prout* pleas); and thereupon issue was joined between them.

And afterwards, to wit, at a session of said court, held at the district aforesaid before the Honorable William Butler, president of the said court, on the 24th day of November, A. D. 1886, the aforesaid issue between the said parties came — to be tried by a jury of the said — for that purpose duly impannelled (*prout* list of jurors); at which day came as well the said plaintiff as the said defendant, by their respective attorneys; and the jurors of the jury aforesaid impannelled to try the said issues, being also called, came and were then and there in due manner chosen and sworn or affirmed to try the said issue; and upon the trial the counsel of the — said:

21 The plaintiff proved that certain cargoes of iron ore were imported by the defendant into the port of New York, the goods being Bilboa ore (that is, Spanish), loaded in vessels at Bordeaux, in France, and brought into the United States.

That by the appraiser there was added 16.75 livas per ton to the values at which the cargoes were entered to make market value at Bordeaux, from whence the ore was shipped; that thereupon, on the 2nd day of August, 1882, the defendant demanded a re-appraisement and paid the fee required; that the amount at which the cargoes were entered and the advances made by the appraiser are as follows:

22

Date.	Vessel.	Tons cwt.	Entry value.	Added by apprais't.	Added by merch't app't.	Final liqu.	True liqu., @ 20 % duty.	Ent'd value @ 20 % duty.	Am't still due Gov't.
1882.									
June 15	C. Lafitte	751.4	$1,635	6 pestas	63/4 %	$2,526	$506 20	$327 60	$178 20
July 8	Cesarina	539	1,614	2.5 liras	8 "	1,791	358 20	322 80	35 40
18	Roxy Castle	2,233	6,652	1.66 "	8 "	7,718	1,543 60	1,330 40	213 20
22	Teutonia	1,000	2,988	2.5 "	8 "	3,515	703	597 60	105 40
31	St. Romans	3,720	11,147	1.66 "	8 "	13,049	2,609 80	2,229 40	380 40
Aug. 5	Endymion	2,727	8,171	1.66 "	8 "	9,683	1,936 60	1,634 20	302 40
14	Caduceus	2,095	6,277	1.66 "	8 "	7,325	1,465	1,255 40	209 60
Sept. 2	Vittoria	199	595	1.66 "	8 "	643	128 60	119	9 60
Oct. 14	C. Lafitte	175	346	6 franc. sq. to 60 %		991	198 20	123 80	74 40
		138	273						
			619		6 7/8 %	6,429	1,285 80	1,203	82 80
Nov. 21	Liscard	1,663.5	6,015	1.25 liras	8 "	1,328	265 60	245 80	19 80
Sept. 28	Rosa Donovan	411.10	1,229	1.66 "					
									$1,611 20

23 On the 31st of March the r-eappraisement was made and the value of the merchandise was fixed at the advance made by the appraiser, and the duty was finally liquidated by the collector at the value fixed by the re-appraisement, from which there was no protest or appeal, and the plaintiff closed the case.

Mr. McMurtrie, on behalf of the defendant, then offered to prove that, after the demand for a merchant appraisement, a day was fixed for the meeting in June, 1883; that the defendant attended and the general appraiser and the merchant appraiser, and that the defendant was prepared to go on; but that the Government asked for an adjournment, and the hearing was adjourned without a day being fixed, it being stated to the defendant that he would be notified.

Mr. Valentine objected to the offer because protest and appeal were not duly made, and that therefore the re-appraisement was final and conclusive, and that, the purpose of the offer not being to show that there was fraud in the appraisement or want of power in the appraisers, no evidence to invalidate the appraisement was admissible.

24 The objection was overuled and exception noted for the plaintiffs.

The defendant then proved that he demanded a merchant appraisement and a merchant appraisement was ordered and a day appointed for the hearing in June, 1883.

On the day fixed the defendant attended and the general appraiser and the merchant appraiser; that then the Government asked for an adjournment, and the hearing was adjourned without a day being fixed, but it being stated to defendant that he would be notified.

That the next thing that occurred was that a notice was received at defendant's place of business, which was as follows:

"UNITED STATES GENERAL APPRAISER OFFICE,
PORT OF NEW YORK, *March 18th*, 1884.

SIR: The re-appraisement called by you on an invoice of iron ore imported per S. S. from Leghorn, Bordeaux, and London will take place at this office Thursday, March 20, '84, at 12.

Respectfully, A. J. PERRY,
General Appraiser.

Alfred Earnshaw, Esq., Philadelphia, Pa."

25 At that time the defendant was at Santiago de Cuba, in the Island of Cuba. The letter was received by his brother and clerk and answered thus:

"MARCH 19, '84.

"General appraiser, port of New York.

"DEAR SIR: I am this morning in receipt of your notice of re-appraisement. Mr. Earnshaw is out of the country at present and is not expected back before the beginning of May, and I must, there-

fore, ask you to be kind enough to postpone the said re-appraisement.

" Yours truly, ALFRED EARNSHAW,
" Per W."

To this a telegram was sent as follows:

" NEW YORK, *Mar.* 19.

" To Alfred Earnshaw, 203 Walnut Place:

" Your cases adjourned to Tuesday, Mar. 25th, 12 m.

"A. S. BRIGGS,
" *U. S. Gen'l Appr.*"

26 On the 10 May the defendant, having returned from Cuba, having had no other notice of the re-appraisement than as above stated, he received a demand for payment as follows:

"*Notice of Balance of Duties Due on Importations.*

" CUSTOM HOUSE, NEW YORK,
" COLLECTOR'S OFFICE, 7TH DIVISION, *May* 10, '84.

" SIR: Upon an importation of yours (entry No. —), per S. S. Endymion, there is a balance due the United States amounting to $302.40. If not paid immediately it will be sent to the district attorney for collection.

" Very respectfully, GEO. W. PALMER,
"*Deputy Collector, T. D. C.*"

There then ensued the following appeal and correspondence between the defendant and the authorities of the United States:

27 " PHILA., *May* 14, '84.

" To Secretary of the Treasury, Washington, D. C.

" SIR: I have to appeal the following cases of re-appraisement on cargoes of iron ore at New York:

" R. Donovan.
" Chateau Lafit.
" Liscard.
" Vittaria.
" C. Lafit.
" Teutonia.
" Caduceus.
" St. Romans.
" Endymion.
" Cesarina.

" These cases, after hanging for quite a long time in New York, were called at a merchant appraisement held during the summer at which I was present.

" The re-appraisement was adjourned without date to permit of consultation with General A. T. Ketcham, late general appraiser, and also to permit the presentation of a special agent's report
28 which was not then to hand.

"On the 19 March last, during my absence from the country, notice was received at my office that the said cases were set down for March 25 for the adjourned re-appraisement.

"A letter was sent the same day informing the general appraiser that I was absent from the country and should not be back here before the beginning of May and asking that the re-appraisemen tbe held over till my return. This does not appear to have been been done, for I yesterday received notice that all the cases in question would be sent to the district attorney for collection of the various balances said by me to be owing unless immediately paid, etc.

"I ask that you order a rehearing of these cases because the adjournment last summer was asked for by the Government to admit of the presentation of their case, and that it was agreed to by me upon the understanding that the cases should not be decided without giving me the opportunity of stating my case and offering evidence to rebut anything new in the special agent's report.

29 "When the adjournment was asked for last summer the Government presented no witness and no evidence.

"The same ore now in question has been up for re-appraisement, both in New York, Baltimore, and here, several times, and always decided in my favor until the cargoes in question, and it is evident, therefore, that something new has been offered in evidence, and I ask to have the opportunity of rebutting the evidence.

"Yours truly, ALFRED EARNSHAW."

"JUNE 7, 1884.

"Hon. Charles J. Folger, Sec. of Treasury, Washington, D. C.

"SIR: On the 14th May last I made an appeal to the Department asking for a rehearing of certain importations of iron ore, to wit:

"Rosa Donovan.
"Rox Castle.
"Chateau Lafite.
"Liscard.
"Vittoria.
"Cesarina.
Chateau Lafit.
Teutonia.
Caduceus.
St. Romans.
Endymion.

30 "Which had been decided at merchant appraisement in my absence contrary to arrangement. I notified through my C. H. broker in N. Y., J. Ward Lydecker and Co., the officials in N. Y., that I had made this appeal, and was informed that the cases would be held over pending the reply from the Department.

"On the 5th June I received a letter from the bureau of protest and appeal at N. Y. asking me to furnish them with the entry numbers and warehouse-bond numbers of said entries, which letter I referred the same day to my aforesaid C. H. brokers in N. Y., requesting them to furnish the bureau the information required. They wrote me under date of yesterday (June 6) that the entries referred to were sent to the district attorney on May 23, and that the chief of the bureau of protest and appeals declined to send for them.

"Will the Department kindly inform me what further action is necessary on my part to secure the consideration of these cases which I asked for in my original appeal?

"Yours truly, ALFRED EARNSHAW."

31 "TREASURY DEPARTMENT, OFFICE OF THE SECRETARY,
"WASHINGTON, D. C., *June* 12, 1884.

"Alfred Earnshaw, Esq., No. 203 Walnut St., Philada., Pa.

"SIR: Referring to your letter of the 7th inst., I have to state that a report has been requested from the collector of customs at New York relative to the entries to which you refer as having been sent to the district attorney, and that, upon the receipt of his reply, such action will be taken as the circumstances may show to be proper.

"Very respectfully,
——— ———,
"Ass't Secretary.

"No inclosure."

"TREASURY DEPARTMENT, OFFICE OF THE SECRETARY,
"WASHINGTON, D. C., *July* 11, 1884.

"Alfred Earnshaw, Esq., 203 Walnut Place, Philada., Pa.

32 "SIR: Referring to this Department's letter of the 12th ult'o, relative to your application for relief from the decision of the solicitor of customs of N. Y. assessing duty on the appraised value as returned upon the re-appraisement of certain iron ore imported by you in the vessels named in previous correspondence, I have to state that a report upon the subject has been received from the collector of customs at N. Y.

"It is ascertained that on all the entries covered by your appeal (7121 I) additional duties accrued, and that, the importer having failed to make payment thereon, the entries and invoices were placed in the hands of the U. S. attorney with a view to the collection of the additional duties in the usual manner.

"The papers were temporarily recalled from the district attorney and inspected by the U. S. general appraiser at N. Y., whose report shows that the cases were first brought to his attention March 23, 1883, and were before him for action on that date and on the 25th and 31st March and the 24th April following, and again from
33 time to time, and were finally decided on the 31 March, 1884.

"His report also shows that from June 27, 1883, to April 3, 1884, he had no information, suggestion, or belief that you desired to be present at the re-appraisement, and that his conclusion was confirmed by your failure to appear when the cases were set down for hearing after you had been duly notified.

"It seems that he and the merchant appraiser acted upon the best evidence before them, and believed from your correspondence that you could supply nothing further in the way of valuable information touching the questions prescribed for the consideration of the re-appraiser.

"The proceedings seem to have been regular and this Department is unable to discover any good ground on which they could be set

aside, and therefore decline to give further consideration to the matter.

"Very respectfully, CHAS. J. FOLGER, *Secretary.*

"No inclosure."

34 "JULY 14, 1884.

"Hon. Chas. J. Folger, Secretary of Treasury, Washington, D. C.

"SIR: I have to acknowledge the receipt of your favor of the 11th July and have read the same.

"You appear to have entirely overlooked the fact that when I was present at the examination a year last June the case was adjourned for the purpose of permitting the Government to present evidence, and it was clearly stated at that examination, before I consented to the adjournment, that if the Government presented any evidence of importance I should wish to present counter-evidence.

"Further, the general appraiser was notified in writing of my absence from the country when he appointed the case for hearing in March.

"It is clearly against all custom in law or equity that when one party to a suit applies for an adjournment, when the other party is present and willing to continue the suit, that they should proceed, in the absence of that party upon adjournment, to try the case, especially when they are notified that the party is absent from the country.

35 "It may appear to the Department that the matter is in order and in accordance with the usage of the Department, and with this latter I am rather inclined to agree; but to my mind it is such an outrageous case of high-handed unfairness that I shall compel the Government to sue me for every case involved, and I shall prefer to take my chances before twelve honest jurymen and an impartial judge than trust the red-tape bureaucracy of the Department with a case in which I simply ask for justice and my rights.

"Yours truly, ALFRED EARNSHAW."

"TREASURY DEPARTMENT, OFFICE OF THE SECRETARY,
"WASHINGTON, D. C., *July* 26, 1884.

"Alfred Earnshaw, Esq., 203 Walnut St., Philada., Pa.

"SIR: Your letter of the 14th inst., further in regard to a re-appraisement of merchandise imported by you at N. Y., was duly received and has had careful consideration.

36 "The complaint is that the re-appraisement proceedings were closed without giving you an opportunity which you desire to present evidence in your own behalf, you being absent at the time from the country.

"It is the judgment of the Department that the general appraiser at N. Y. did not intend to do you a wrong or to violate any obligation of good faith by proceeding with the re-appraisement to a final

conclusion in your absence, and that he believed upon the facts that he was justified in taking that proceeding. Any further discussion of the case would be of no value to you unless it is productive of some beneficial results.

"The Department fails to see how under the present situation of the case the re-appraisement proceedings can be opened to admit testimony at the present time, they having been fully closed and the duties finally liquidated.

"If you choose to assume the position intimated in your letter, that you will not pay the additional duties due, but will stand suit for the same, this Department cannot control your action in that respect.

37 "I may add that a letter of instruction has been sent to the collector of customs at New York rejecting your appeal filed under section 2931 of the Revised Statutes, on the importations referred to, on the ground that the protests were not filed covering any of the importations, and appeal was not taken within the statutory time except as to the entry per 'St. Romans,' August 1, 1882, to which the objection also applies of no protest.

"Very respectfully, CHAS. E. COON,
"Acting Secretary."

The defendant then read in evidence the following regulations by the Secretary of the Treasury: Art. 466. On the receipt of this report the collector will select one discreet and experienced merchant, a citizen of the United States, familiar with the character and value of the goods in question, to be associated with an appraiser at large, if the attendance of such officer be practicable, to examine and appraise the same according to law. R. S., 2930.

* * * The appraiser at large will be notified of the appeal, of the time fixed for re-appraisement, and of the name of the merchant appraiser. The importer will be notified of the time

38 and place, but not of the name of the merchant selected to assist in the appraisement.

* * * The importer or his agent will be allowed to be present and to offer such explanations and statements as may be pertinent to the case."

(Copied from General Regulations under the Customs and Navigation Laws, &c., 1884. Printed at the Government Printing Office, 1884, Washington.)

The defendant then asked the judge to instruct the jury—

1. If the defendant attended on the day appointed for the appraisement by the merchant appraiser, and the United States not being ready to go on and the hearing postponed indefinitely, the defendant was entitled to such reasonable notice of the time and place of holding the appraisement as would enable him to attend.

2. If the United States failed to move in the matter after the adjournment from June, 1883, until March, 1884, and the defendant was then temporarily absent from home, he was entitled to a reasonable time to return and attend at the appointment.

3. If the United States — on proceeding with the re-appraise-
39 ment in the absence of the defendant, under the circumstances, as shown by the testimony, the re-appraisement is not a valid merchant's appraisement.

The court reserved the point whether the defendant was entitled to the instructions prayed for and instructed the jury that the examination of the case made at a former trial led the court to the conclusion that the defendant was entitled to notice under the regulations of the Department and the rules of law appertaining to hearing in such cases, and that in the absence of notice the merchant appraisement was void.

In disposing of the motion for a new trial under the reserved points, I reached the conclusion that the court must hold that the defendant received the notice contemplated by the regulations and the law; that the notice served at the dwelling or store of the defendant was a proper notice; that the fact of his absence from the country did not deprive the act of its character as a notice; that it was a question for the appraisers themselves as to whether the re-appraisement should be postponed so that the defendant might have time to return and be heard; that while it might be said that their judgment was harsh and unfair in refusing to do so and hold-
40 ing the appraisement in his absence, yet that the action of the appraisers in this respect the court could not review.

The court must therefore hold that such notice was given to the defendant as is contemplated by the regulations of the Department and the rules of law governing re-appraisements, that the re-appraisement was valid, and that the plaintiff is entitled to recover a verdict for the amount of the claim, $1,611.20, with interest.

To which instructions to the jury the defendant excepted, and the court sealed this bill of exceptions.

And thereupon the counsel for the said defendant did then and there except to the aforesaid charge and opinion so excepted to — do not appear upon the record.

The said counsel for the said defendant did then and there tender this bill of exceptions to the opinion of the said court and requested the seal of the judge aforesaid should be put to the same according to the form of the statute in such case made and provided; and thereupon the aforesaid judge, at the request of the said counsel for the defendant, did put his seal to this bill of exceptions, pursuant to the aforesaid statute in such case made and provided, this 25th day of April, A. D. 18—.

WM. BUTLER. [SEAL.]

41 In the Circuit Court of the United States for the Eastern District of Pennsylvania. (August, 1884.)

UNITED STATES
vs.
ALFRED EARNSHAW. } No. 23. U. S. D. C.

Assignment of Errors and Prayer for Reversal of Judgment.

The plaintiff in error, Alfred Earnshaw, assigns the following errors in the proceedings of the court below:

1. The court erred in deciding that no one could enquire whether the time given in the notice of the hearing was sufficient, or whether the reason for asking for a postponement was sufficient, and that the discretion of the general appraiser of the U. S. on this subject was conclusive.

Whereas the court should have decided and instructed the jury that it was a question of fact under all the circumstances whether the notice of the hearing given by the general appraiser of the U. S. was a reasonable and proper notice.

42 2. The court erred in not deciding that the notice given by the general appraiser of the U. S. was not a sufficient one under the circumstances.

3. The court erred in not deciding that the general appraiser of the U. S. did not exercise a legal discretion in respect of the notice given for the holding of the re-appraisement called by the defendant on the cargoes mentioned in the bill of exceptions.

And the defendant prays that the judgment entered in this cause in the district court may be reversed.

And afterwards, to wit, on the 25th day of May, A. D. 1887, a bond of the defendant, with surety in $2,500, being filed, is in the words and figures following, to wit:

District Court of the United States for the Eastern District of Pennsylvania.

Know all men by these presents that we, Alfred Earnshaw and the City Trust Safe Deposit and Surety Company of Philadelphia, are jointly and severally held and firmly bound to the United States in the sum of two thousand five hundred dollars, lawful money of the United States to be paid to the said United States; to which

43 payment, well and truly to be made, we bind ourselves, our and each of our heirs, executors, and administrators and successors, firmly by these presents.

Sealed with our seals. Dated this 23rd day of May, 1887.

Whereas the above-mentioned Alfred Earnshaw has prosecuted a writ of error to the circuit court of the United States for the eastern district of Pennsylvania to reverse the judgment rendered against

him as aforesaid by the district court of the United States for the district aforesaid in an action of trespass on the case at the suit of the United States, of August session, 1884, No. 23:

Now, the condition of this obligation is such that if the above-named Alfred Earnshaw shall prosecute his said writ of error to effect and answer the amount recovered against him in said district court and all costs and damages which may be adjudged against him if he shall fail to make good his plea, then this obligation to be void, or else to be and remain in full force and virtue.

ALFRED EARNSHAW. [SEAL.]
THE CITY TRUST, SAFE DEPOSIT AND SURETY CO. OF PHILADELPHIA,
CHAS. M. SWAIN, *President.*
Attest: JAMES F. LYND, *Secretary.* [SEAL.]

Witnesses present:
JOHN RODGERS.
A. B. RONEY.

44 On this 20th day of May, A. D. 1887, before me, the subscriber, a notary public in and for the city of Philadelphia, personally came Alfred Earnshaw and duly acknowledged the above-written bond to be his act and deed for the uses and purposes therein mentioned.

Witness my hand and seal.

[SEAL.] JOHN RODGERS,
Notary Public.

On this 23rd day of May, A. D. 1887, before me, the subscriber, a notary public in and for the city of Philadelphia, personally appeared Charles M. Swain, the president of the City Trust, Safe Deposit and Surety Company, and, being affirmed, deposeth and saith that he was personally present at the execution of the above-written bond and saw the common seal of said corporation duly affixed thereto, and that the seal so affixed thereto is the common or corporate seal of said corporation, and that the above-written bond was duly signed, sealed, and delivered by and as and for the act and deed of said corporation for the uses and purposes therein mentioned, and that the name of this deponent, subscribed to the said
45 bond as president of said corporation, and of James F. Lynd, as secretary, in attestation of the due execution and delivery of the same, is of their own proper and respective handwriting.

CHARLES M. SWAIN.

Affirmed and subscribed before me the day and year aforesaid.
Witness my hand and notarial seal.

[SEAL.] J. H. WHEELER,
Notary Public.

UNITED STATES OF AMERICA, }
Eastern District of Pennsylvania, } *ss:*

I, Charles S. Lincoln, clerk of the district court of the United States for the eastern district of Pennsylvania, do hereby certify that the annexed and foregoing is a true and faithful copy of the record and proceedings in the said court in a certain action of summons case therein lately depending, wherein The United States of America are the plaintiffs and Alfred Earnshaw is the defendant, as full and entire as the same now remains of record in said court.

In testimony whereof I have hereunto subscribed my hand and affixed the seal of the said district court this twenty-fifth day of May, A. D. 1887, and in the 111th year of the Independence of the said United States.

W. W. CRAIG,
Pro Clerk.

46 UNITED STATES OF AMERICA, }
Eastern District of Pennsylvania, } *ss:*

The President of the United States to the judge of the district court of the United States for the eastern district of Pennsylvania, Greeting:

Because that in the record and process, and also in the rendering of judgment in a suit, before you, between The United States of America, plaintiff, and Alfred Earnshaw, defendant, in a plea of trespass on the case, a manifest error has intervened, to the great damage of the said Alfred Earnshaw, as in his complaint has been stated, and as it is just and proper that the error, if any there be, should be corrected in due manner, and that full and speedy justice should — done to the party aforesaid in this behalf, you are hereby commanded that, if judgment thereof be given, then, under your seal, you do, distinctly and openly, send the record and process in the suit aforesaid, with all things concerning them and this writ, so that you have the same before the honorable the judges of the circuit court of the United States in and for the eastern district of Pennsylvania,
47 in the third circuit, sitting at Philadelphia, Pennsylvania, on the first Monday of October next, that, the record and process aforesaid being inspected, they may cause to be done what of right ought to be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, at Philadelphia, this
[SEAL.] 25th day of April, A. D. 1887, and in the 111th year of the Independence of the said United States.

SAMUEL BELL,
Clerk Circuit Court U. S.

(Endorsed:) No. 12. April sess., 1887. C. C. U. S., E. D. of Pa. Earnshaw, pl'ff in error, *vs.* The United States, def't in error. Writ of error. Brought into the office of the clerk of the district court this 25th day of May, A. D. 1887. Charles S. Lincoln, clerk dist. court.

48 THE UNITED STATES OF AMERICA, *ss:*

To the United States of America, Greeting:

You are hereby cited and admonished to be and appear at a circuit court of the United States for the eastern district of Pennsylvania, to be holden at Philadelphia on the first Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the eastern district of Pennsylvania, in the third circuit, wherein Alfred Earnshaw — plaintiff and you are defendant in error, to show cause, if any there be, why the judgment rendered against said plaintiff in error, as in said writ of error mentioned, shall not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness my hand this 24th day of May, in the year of our Lord one thousand eight hundred and — seven.

WM. BUTLER, *Judge.*

I hereby accept service of the above writ.

JOHN K. VALENTINE,
Att'y for the United States.

5, 24, 87.

Endorsed: No. 12. April sess., 1887. Circuit court U. States, E. dist. of Penna. Earnshaw, plaintiff in error, *vs.* The United States, defendant in error. Citation on writ of error and acceptance of service of same by the defendant. Brought into the clerk's office of the district court this 25th day of May, A. D. 1887. Charles S. Lincoln, cl'k dist. court.

49 (Endorsed:) No. 12. April sess., 1887. Circuit court U. States, eastern dist. of Penna. Alfred Earnshaw, plaintiff in error, *vs.* The United States of America, defendant in error. Record of the district court, with writ of error and citation. Filed 25 May, 1887.

50 And afterwards, to wit, on this 28th day of May, A. D. 1887, this cause coming on for argument upon record of the district court and having been argued by the respective counsel for plaintiff and defendant, after consideration by the court it is ordered, adjudged, and decreed that the judgment of the district court of the United States in favor of the plaintiff be, and the same is hereby, affirmed.

51 In the Circuit Court of the United States in and for the Eastern District of Pennsylvania, in the Third Circuit.

ALFRED EARNSHAW, Plaintiff in Error,
vs.
UNITED STATES, Defendants in Error. } No. 12. April Sess., 1887.

Know all men by these presents that we, Alfred Earnshaw, as principal, and the City Trust, Safe Deposit and Surety Company of

Philadelphia are held and firmly bound unto the United States of America in the full and just sum of twenty-five hundred dollars, to be paid to the said The United States of America, its certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our successors, heirs, executors, and administrators, jointly and severally by these presents.

Sealed with our seals and dated this seventh day of June, A. D. 1887.

Whereas lately, at a term of the circuit court of the United States in and for the eastern district of Pennsylvania, in the third circuit, in a suit depending in said court between Alfred Earnshaw, plaintiff, and The United States of America, defendant, judgment was rendered against the said plaintiff, and the said plaintiff having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation, directed to the said The United States of America,
52 citing and admonishing it to be and appear at a Supreme Court of the United States to be holden at Washington the second Monday of October next ensuing:

Now, the condition of the above obligation is such that if the said Alfred Earnshaw shall prosecute his writ of error to effect and answer all damages and costs if he fail to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

ALFRED EARNSHAW.
THE CITY TRUST, SAFE DEPOSIT AND SURETY CO. OF PHILADELPHIA,
CHARLES M. SWAIN, *President.*

Attest: JAMES F. LYND, *Sec't'y.* [SEAL.]

Sealed and delivered in presence of—
WM. G. MORRIS,
As to Alfred Earnshaw.

Surety approved:
WM. BUTLER, *Judge.*

[Endorsed:] No. 12. April sess., 1887. Circuit court United States. Alfred Earnshaw *vs.* United States. Bond surwrit of error. Filed 10 June, 1887.

53 UNITED STATES OF AMERICA, }
Eastern District of Pennsylvania, } *sct:*

I, Samuel Bell, clerk of the circuit court of the United States of America for the eastern district of Pennsylvania, in the third circuit, do hereby certify the foregoing to be a true and faithful copy of the original pleas and proceedings in the case of Alfred Earnshaw, plaintiff in error, *vs.* The United States, defendant in error, No. 12, April session, 1887, on file and now remaining among the records of said court in my office.

In testimony whereof I have hereunto subscribed my name and affixed the seal of the said court, at Philadelphia, this 10th day of June, in the year of our Lord one thousand eight hundred and eighty-seven, and of the Independence of the United States the one hundred and eleventh.

Seal U. S. Circuit Court, E. D. Pennsylvania.

SAMUEL BELL,
Clerk of C. C.

[Endorsed:] No. —. Sessions, 188–. Circuit court United States, eastern district of Pennsylvania. Certified copy.

54 EARNSHAW
v.
UNITED STATES.

Assignment of Errors.

The plaintiff in error, Alfred Earnshaw, assigns the following errors in the proceedings of the court below:

1st. The court erred in deciding that no one could inquire whether the time given in the notice of the hearing was sufficient or whether the reason for asking for a postponement was sufficient, and that the discretion of the general appraiser of the United States on this subject was conclusive:

Whereas the court should have decided and instructed the jury that it was a question of fact under all the circumstances whether the notice of the hearing given by the general appraiser of the United States was a reasonable and proper notice.

2nd. The court erred in not deciding that the notice given
55 by the general appraiser of the United States was not a sufficient one under the circumstances.

3rd. The court erred in not deciding that the general appraiser of the United States did not exercise a legal discretion in respect of the notice for the holding of the re-appraisement called by the defendant on the cargoes mentioned in the bill of exceptions.

R. C. McMURTRIE,
For Pl'ff in Error.

[Endorsed:] Earnshaw *v.* United States. Ass't of errors.
[Stamped:] Office Supreme Court U. S. Filed Jun- 21, 1887. James H. McKenney, clerk.

Endorsed on cover: E. Pennsylvania C. C. U. S. No. 339. Alfred Earnshaw, plaintiff in error, *vs.* The United States. Filed June 21, 1887.

146 U.S. 60

Office Supreme Court, U. S.
FILED.
OCT 10 1889
JAMES H. McKENNEY,
CLERK.

SUPREME COURT OF THE UNITED STATES.

Earnshaw
vs.
The United States.

October, 1889.
No. 339.

BRIEF FOR PLAINTIFF IN ERROR.

The United States sued Earnshaw for a balance due for duties on iron ore imported into New York in 1882.

At the entry of the goods their values were declared and to these the appraiser made an addition, and from this appraisement Earnshaw appealed and demanded a reappraisement on the 2d August, 1882. (Page 9 of the Record.)

A day was fixed for the hearing in June, 1883. On that day Earnshaw attended, as did the general appraiser and the merchant appraiser. The Government asked for an adjournment, and it was adjourned, the day not being named; but Earnshaw was told he would be notified. (Record, page 11.)

Earnshaw lived in Philadelphia. On the 18th March, 1884, nine months after the adjournment, a notice was sent him at Philadelphia that the reappraisement would take place at noon on the 20th. (Record, page 11.)

Earnshaw was then in Cuba. The general appraiser was notified of this by Earnshaw's brother, and asked to postpone the hearing till his return in May. (Record, page 11.)

In reply, the hearing was adjourned till March 25th, at noon. (Record, page 12.)

On the 31st March, in the absence of Earnshaw and with no one acting for him, the reappraisement was held (Record, page 11), and for the difference between the amount he had paid and the amount thus ascertained this action was brought.

At the trial, the defendant having read the statute authorizing the demand for a reappraisement, read the following regulation of the Treasury Department to show that he was entitled to notice to be present at the reappraisement that he might tender evidence. (Record, page 16.)

Article 466.—On the receipt of this report the collector will select one discreet and experienced merchant, a citizen of the United States, familiar with the character and value of the goods in question, to be associated with an appraiser-at-large, if the attendance of such officer be practicable, to examine and appraise the same according to law. R. S., 2930. * * * The appraiser-at-large will be notified of the appeal, of the time fixed for reappraisement, and of the name of the merchant appraiser. The importer will be notified of the time and place, but not of the name of the merchant selected to assist in the reappraisement. * * * The importer, or his agent, will be allowed to be present and to offer such explanations and statements as may be pertinent to the case. (Copied from General Regulations under the Customs and Navigation Laws, &c., 1884.) Printed at the Government Printing Office, 1884, Washington.)

The defendant then asked the judge in the District Court to instruct the jury:—

1. If the defendant attended on the day appointed for the appraisement by the merchant appraiser, and the United States not being ready to go on, and the hearing postponed indefinitely, the defendant was entitled to such reasonable notice of the time and place of holding the appraisement as would enable him to attend.

2. If the United States failed to move in the matter after the adjournment from June, 1883, until March, 1884, and the defendant was then temporarily absent from home, he was entitled to a reasonable time to return and attend at the appointment.

3. If the United States, on proceeding with the reappraisement in the absence of the defendant, under the circumstances, as shown by the testimony, the reappraisement is not a valid merchant's appraisement.

The judge instructed the jury "that such notice was given to the defendant as is contemplated by the regulations of the department and the rules of law governing reappraisements, and that the reappraisement was valid, and that the plaintiff is entitled to recover a verdict for the amount of the claim, $1611.20, with interest," reserving the questions whether the defendant was entitled to the instructions as asked by him. This sum was the amount claimed over and above the amount paid, upon which the goods had been delivered to Earnshaw.

The said judge, when considering the points reserved, said: "The defendant's only substantial ground of complaint is the appraisers' refusal to adjourn the hearing until a future time.

"Proper notice was sent him, in pursuance of which his representative attended and requested an adjournment.* This request was refused. Whether it should have been granted the court cannot consider. The appraisers were the sole judges of this. I cannot assume that they abused their authority—acted arbitrarily—without the exercise of the discretion committed to them, and on this ground treat the appraisement as void. Judgment must therefore be entered on the verdict for the plaintiff."

Whereupon judgment was entered accordingly.

In the Circuit Court the defendant below, being the plaintiff in error, assigned errors in the proceeding in the District Court, as follows:—

The plaintiff in error, Alfred Earnshaw, assigns the following errors in the proceedings of the court below:—

1. The court erred in deciding that no one could inquire whether the time given in the notice of the hearing was sufficient, or whether the reason for asking for a postponement was sufficient, and that the discretion of the general appraiser of the United States on this subject was conclusive, whereas the court should have decided and instructed the jury that it was a question of fact, under all the circumstances, whether the notice of the hearing given by the general appraiser of the United States was a reasonable and proper notice.

* This is a mistake in fact, as the record shows no one attended. A telegram was sent stating the absence, and requesting an adjournment.

2. The court erred in not deciding that the notice given by the general appraiser of the United States was not a sufficient one under the circumstances.

3. The court erred in not deciding that the general appraiser of the United States did not exercise a legal discretion in respect of the notice given for the holding of the reappraisement called by the defendant on the cargoes mentioned in the bill of exceptions.

The court affirmed the judgment of the District Court without explanation or remark.

(MEMORANDUM.—In assigning errors in this court it is not practicable to set out the charge or the ruling, which are the real questions, as they were in the District Court, as the error to be assigned is in the judgment of the Circuit Court. I have, therefore, set out the proceedings in the District Court as they would have been imbodied in the assignments of error had this been a writ of error to that court. The object of the rule of this court, No. 21, III., section 5, is, I believe, thus attained, and, as far as practicable, literally complied with.)

ASSIGNMENTS OF ERROR.

IN THE SUPREME COURT OF THE UNITED STATES.

The court erred in not reversing the judgment of the District Court for the reasons assigned on the record, viz.:—

1. Because the District Court decided that no one could inquire whether the time given in the notice of the hearing was sufficient, or whether the reason for asking for a postponement was sufficient, because the exercise of the discretion of the general appraiser of the United States on this subject could not be inquired into.

2. In ruling that the notice of the hearing given in this case was sufficient.

3. In not deciding that the District Court ought to have decided that the general appraiser of the United States did not

exercise a legal discretion, that is, did not exercise his discretion in a legal manner, in respect of the notice given for the holding of the reappraisement called by the defendant on the cargoes mentioned in the bill of exceptions.

R. C. McMURTRIE,
For Plaintiff in Error.

A reargument has been ordered in this case. The former brief with some additions is now submitted.

ARGUMENT.

The defendant had paid all that was demanded, saving the increased duties imposed in March, 1884, on goods imported in June–September, 1882. So that the only question was the validity of the reappraisement and the consequent addition of duties under this reappraisement. If that appraisement was not a lawful one the foundation of the claim fell.

At the former argument a member of the court inquired if the importer had given any evidence to show that the reappraisement was incorrect in amount. The reply was that none was tendered, because evidence of that character was not admissible.

The authorities are distinct—the appraisement is conclusive if it is legal. Error in fact or mistakes cannot be inquired into. Act of 1842, c. 270, s. 17; 5 St. at Large, 564; Rankin *vs.* Hoyt, 4 How., 335; Bartlett *vs.* Kean, 16 How., 272; Sampson *vs.* Peaslee, 20 Howard, 575, 580. In Wisbray *vs.* United States, 18 Wallace, 325, evidence of this character was offered and rejected because the act of the collector was conclusive, and this was affirmed. See page 329. And this was again recognized in U. S. *vs.* Schlesinger, 120 U. S., 114, where the converse proposition was before the court, and where the defense was, as here, that the assessment was illegal.

The valuation is conclusive. 110 U. S., 97, Hilton *vs.* Merritt. There is no right to go to a jury on the subject of the values. 123 U. S., 361, Oelberman *vs.* Merritt. But the importer can show that the appraiser had not the qualifications required by the statute. *Id.*

On the first trial it was ultimately admitted by the court that the importer was entitled to notice of the reappraisement, and then it became the question in the cause whether, under the circumstances, the notice given was reasonable.

The importer had been ready and had attended at the times appointed for the hearing, but the United States was not prepared to go on nor to fix a time when they would be ready. (Record, page 11, star page 24.) They postponed the hearing indefinitely and for their convenience and on a promise of notice. (Record, page 24.) Nine months after this, on a few days' notice, while defendant was absent temporarily from the country, they determined to go on, disregarding the application for time to permit the return of the defendant. (Record, pages 25, 26.)

It is insisted by the plaintiff in error, as it was in the court below, that the real question was whether the defendant was entitled to notice; for if this be the case the legal consequence was supposed to be that it must be a reasonable one. There is not an instance that can be produced in which notice is requisite and reasonableness of the notice is not involved.

This is one of the class of propositions that is demonstrated by extreme illustrations, *e. g.*, notice *after* the hearing was had, or notice left at 10 P. M. to attend a hearing at a place miles distant at 11 P. M. For the *point* of the decision is that there is no jurisdiction to inquire, none to consider what the notice was even if on its face it was no notice.

Obviously the only object of a notice is to enable the person receiving it to protect his interest, and it is mere contradiction to say the law requires notice before the act is done, but that it is quite immaterial whether it is possible to avail oneself of it; on the second trial the court came to the conclusion that neither court nor jury could inquire if the notice was reasonable. We submit that if this be the law, the requirement of notice is useless, or, more correctly, that there is no necessity for notice.

The points then seem to be:—

I. Is the importer entitled to notice of a reappraisement?

II. If he is, it must be a reasonable notice, looking to all the circumstances.

III. There is a third point, or rather there was one, insisted on by the District Attorney, but to which no attention was paid by the court, viz., could the defendant defend an action for money if brought by the United States, without having first protested against something, (no one was able to say what, but) probably against the assessment of the duty.

1. It may not be a necessary logical deduction from the fact that the question involved is one to be determined by proof or evidence, that we were entitled to notice; but it is important to observe that the case was an appeal from an assessment, and that the new assessors were to be governed by evidence. Marriott *vs.* Brown, 9 Howard, 634 *sub. fine.*, and it is a necessary *legal* deduction, or a deduction of legal, that is, of practical logic.

The statute itself is silent on the subject of when and how this new body is to act. The regulations of the Treasury Department assume that the importer is entitled to be present. It says, article 466 (General Regulations under the Customs and Navigation Laws, &c., 1884, printed at the Government Printing office, 1884, Washington): The appraiser-at-large shall be notified of the appeal, of the time fixed for reappraisement, and of the name of the merchant appraiser. *The importer will be notified of the time and place, but not of the name of the merchant selected.* * * * *The importer or his agent will be allowed to be present, and to offer such explanations and statements as may be pertinent to the case.* Certainly a regulation of the treasury *in favor of the citizen*, and tending to produce justice, is entitled to great weight. It proves that statesmen recognize the right as of course.

And how have the courts construed the statute? The Supreme Court (Campbell, J.), in Bartlette *vs.* Rowe, 10 Howard, 273, quotes as conclusive on the finality of an appraisement a sentence reading thus, "Because in case the importer is dissatisfied with the valuation made by the appraisers, he is allowed by the act of Congress before paying the duty, *an appeal and further hearing before another tribunal*," and points

out that this is the substitute for the usual tribunal, viz., a jury. And the point now under discussion is simply this, are we entitled *to be heard?* To deny this and yet say we have an appeal, and that to *a tribunal*, is manifestly a contradiction, for capacity to attend is, I submit, involved in the right to be heard.

The sentence just quoted is itself quoted from 4 How., 335, and contains in addition these words, which are pregnant, after the word *tribunal*, "constituted in part by persons of his own selection;" and still further, "these persons have been aptly denominated a species of legislative referees," citing 2 Mason, 406. The conduct of these appraisers is inquirable into on the question of the validity of their appraisement. Greeley *vs.* Burgess, 18 How., 415. In 10 How., 241, Greeley *vs.* Thompson, Mr. J. Woodbury points out that the error lay in not adverting *to the judicial character of the merchant appraiser;* in fact his removal by the collector is classed with the conduct of the English Stewarts in removing judges if not sufficiently pliable.

It is assumed that nothing further is required to prove that the importer is entitled to notice of the reappraisement, and that the appraisers are performing a judicial function.

2. Notice of a hearing at which evidence is to be given and a fact ascertained by a *tribunal*, which affects the interests of the person entitled to the notice, means such notice as will enable him to protect his interests. If it does not, and the learned judges were right, this absurdity is involved, that notice *after* the hearing is sufficient. *A* notice is necessary, says the judge, but whether it is one that will serve to notify, we, the judiciary, are not authorized to determine—that is for the discretion of the appraiser.

It was supposed this was a legal corollary of the first proposition. At the first trial it was so held, but the court on consideration thought they had been mistaken in this, and that the mode and time of notice was intrusted to the caprice of the appraiser. A discretion not inquirable into is a caprice, so far as third persons are concerned.

If this be so, it is the one exceptional case. I, at least, am not aware of another instance in which a person intrusted by

law to do such a thing can assert that this discretion cannot be inquired into. The most common instance is that of a trustee, and we all know this does not mean his capricious determination. Hill on Trustees, 494–5; 3 Madd., 491; 39 Ch. Div., 446; and by no one is the point better stated than by Chancellor Dessassure; Harper's Eq., 118, Haynesworth *vs.* Cox. The case deserves reading. An executor was given the right to elect which of two things should be given a legatee—a slave or a sum of money. Being interested in the estate he selected a woman past child-bearing and nearly past labor. The court with some emphasis said the discretion was limited to selecting which was the more valuable for the legatee.

The authorities collected by Judge Brown, of the Southern District of New York, in a recent case, seem to render further discussion useless. 27 Fed. Rep., 730, U. S. *vs.* Doherty. He cites from 4 Inst., 41, *Discretio est discerner per legem quid est justum.* In Rooke's Case, 3 Rep., 99–100, it is said, "Notwithstanding the words of the commission give authority to the commissioners to do according to their discretion, yet their proceedings ought to be limited and bounded by the rule of reason and law;" and this was approved by Lord Mansfield and Wilmot, J., in Rex *vs.* Peters, 1 Burr., 568–70. Then the judge cites a case precisely in point here, where it was decided that the discretionary power of adjournment must be exercised reasonably, otherwise the proceedings will be set aside on *certiorari*, though ordinarily such discretion is not the subject of review.

Rose *vs.* Stuyvesant, 8 John., 427.

The reason there was the sickness of a child which had prevented the father attending.

The President *vs.* Patchin, 8 Wend., 47: "Palpable injustice in the exercise of a *discretionary* power may always be corrected on *certiorari*."

These citations by Judge Brown leave nothing to be said. I may add, they are in accord with the English and the authorities of other States.

Passmore *vs.* Petit, 4 Dall, 271; Frey *vs.* Vanlear, 1 Serg. & Raw, 435.

The language of Mr. Justice Field, U. S. *vs.* Kirby, 7 Wallace, 486–7, is very applicable, and the reasoning parallel. A statute making it penal to detain a mail-carrier contains, he points out, an exception by implication that this may be done if he has committed a felony. His words are, "*In general, terms should be so limited in their application as not to lead to injustice, oppression, or an absurd consequence.*"

The court here, in their opinion or charge, plainly intimate that they have no jurisdiction to avoid an act, though they see that it was harsh, unreasonable, and useless for the purpose intended by the law. This is certainly not the rule of the common law. Even when a statute takes away the remedy, by *certiorari* it always remains to correct a judge who has refused to act on the notion that he had no power, if, in fact, by law he had the power.

14 Queen's Bench, 63 ; Reg. *vs.* Grant.

Cooper *vs.* W. Board of Works, 13 C. B., N. S., 180. The question being whether a board vested with authority to demolish a house if certain regulations were not complied with were bound to give the owner notice before making an order. Willes, J., said (page 190): "I apprehend that a tribunal which is by law invested with power to affect the property of one of her majesty's subjects is bound to give such subject an opportunity to be heard before it proceeds, and that the rule is of universal application and founded on the plainest principles of justice." Then he says the board is such a tribunal whether looking at the discretion vested in it or to the analogy which exists between it and other recognized tribunals. Then on page 198 he points out that there was to be a hearing on an appeal, hence "*a fortiori* in the first instance;" and on page 193 he says it is absurd to say the man shall be heard in the suit for the costs, but not heard on making the order that authorizes the suit for costs.

Byles, J., page 194, is to the same effect: whether the board acted judicially or ministerially; and Keating, J., on page 196, that a right to be heard was implied from the fact that a judgment was to be formed as to the extent of the demolition or alteration that was necessary.

This decision does not rest on any right given by the statute, but on the principles of justice applicable to all cases where the rights of others are being dealt with.

Vestry of St. James *vs.* Feary, 24 Queen's B. Div., 709, is to the same effect.

Without meaning any disrespect, the illustration that has been given shows this is merely absurd, for if the court cannot decide that a notice is insufficient, and this for want of jurisdiction, it is clear that a notice not sent till after the hearing cannot be decided to be insufficient.

If, then, the court had the power or jurisdiction to decide that the defendant was entitled to notice of the hearing or appraisement, they had, of necessity, a power to determine whether what was given was legal notice. As they declined because their jurisdiction was not extended to that, the cause must be reversed, unless this court differs from the judge in thinking the notice was sufficient. Was this so? We rely on the circumstances.

1. The cargo had been delivered, and time was quite immaterial. 2. The Government was seeking to correct an error made by one of its officers. 3. The defendant had attended the meeting when the United States, not being prepared, and not being able to say when they would be prepared, put off the meeting with a promise to notify, and at the end of nine months, having fixed on a day, refused to change it, though the defendant had left home to return shortly. 4. It was not pretended that the desired delay was any disadvantage to the United States. And if they could wait, as they had done, from September, 1882, when the importation was made (page 3), to March, 1884, when the appraisement was had, there should be some reason for refusing to continue the case till May, to enable the defendant to attend.

The court will remember that the court below decided that the discretion was not well exercised, but on second thoughts arrived at the conclusion that the judiciary had no jurisdiction in such matters. That there is jurisdiction in respect to every

other act of the appraiser that is illegal is admitted, and it certainly is clear that an improper exercise of discretion is illegal.

3. It was also insisted by the District Attorney that we were not entitled to be heard, as we had not protested. The court disregarded this, and rightly. There is not a pretense for demanding such a preliminary. A protest is required only to prove that a payment is not voluntary, and it has no other object, purpose, or effect.

2 Sm. Sel. Lea. Ca., 456. Note to Marriott *vs.* Hampton, citing four authorities.

In fact, the point is decided in U. S. *vs.* Schlesinger, 120 U. S., 109; reaffirmed, Porter *vs.* Beard, 124 U. S., 429, 433. When the court points out that protests can only be made where the duties are paid *before* delivery of the cargo, and hence, under the statute suit to recover back money paid can only be maintained for payment under those circumstances. But (as here) where the goods have been delivered the only remedy, when a larger sum is demanded, is *by defending the suit.* No statute or rule of the common law requires a protest to entitle a man to defend an unjust suit.

At what time were we to protest, and against what? The goods had been delivered and we had paid the duties; the United States said they had made a mistake and sued us for the amount they say we ought to have paid. This fact, that we had paid the duties on the entered value, appears from the appraisement and assessment, page 10 Record compared with the declaration page 3, which counts only for the additional duties $1611.20, each count being for the added amount on each entry. To require a protest against the appraisement is absurd, for the only point in the case is that we had no notice of there being one. To say they can recover anything they see fit to demand, unless we have protested against their claim, is a misconception of the rule. When a demand is made as a condition to set one at liberty, or to free goods from restraint, the payment may be compulsory or voluntary. To prevent

dispute as to the fact, it is usual to protest that the payment is compulsory; but it is only evidence of compulsion.

2 Smith Lead. Ca., *ut sup.*

This court has now settled that all this law as to protest, so far as respects the customs, is regulated by statute.

Arnson *vs.* Murphy, 109 U. S., 238.

There has been no legislation as to defenses to an action or debt that rests on illegal acts as the evidence of its existence

It is impossible to read the statute and not see that there is no room for a protest except when a payment is to be made by compulsion by the detention of the goods. (Revised Statutes, section 3011.) *Any person who shall make payment under protest*, &c. To impose it as a condition of defending an illegal claim is entirely without warrant, for the United States differs not in this respect from a private person.

R. C. McMURTRIE,
For Plaintiff in Error.

146 U.S. 560

SUPREME COURT OF THE UNITED STATES.

Earnshaw

vs.

The United States.

October, 1889.

No. 339.

The United States sued Earnshaw for a balance due for duties on iron ore imported into New York in 1882.

At the entry of the goods their values were declared and to these the appraiser made an addition, and from this appraisement Earnshaw appealed and demanded a reappraisement on the 2d August, 1882. (Page 9 of the Record.)

A day was fixed for the hearing in June, 1883. On that day Earnshaw attended, as did the general appraiser and the merchant appraiser. The Government asked for an adjournment, and it was adjourned, the day not being named; but Earnshaw was told he would be notified. (Record, page 11.)

Earnshaw lived in Philadelphia. On the 18th March, 1884, nine months after the adjournment, a notice was sent him at Philadelphia that the reappraisement would take place at noon on the 20th. (Record, page 11.)

Earnshaw was then in Cuba. The general appraiser was notified of this by Earnshaw's brother, and asked to postpone the hearing till his return in May. (Record, page 11.)

In reply, the hearing was adjourned till March 25th, at noon. (Record, page 12.)

On the 31st March, in the absence of Earnshaw and with no one acting for him, the reappraisement was held (Record, page 11), and for the difference between the amount he had paid and the amount thus ascertained this action was brought.

At the trial, the defendant having read the statute authorizing the demand for a reappraisement, read the following regulation of the Treasury Department to show that he was entitled to notice to be present at the reappraisement that he might tender evidence. (Record, page 16.)

this report the collector will select one discreet and experienced merchant, a citizen of the United States, familiar with the character and value of the goods in question, to be associated with an appraiser-at-large, if the attendance of such officer be practicable, to examine and appraise the same according to law. R. S., 2930. * * * The appraiser-at-large will be notified of the appeal, of the time fixed for reappraisement, and of the name of the merchant appraiser. The importer will be notified of the time and place, but not of the name of the merchant selected to assist in the reappraisement. * * * The importer, or his agent, will be allowed to be present and to offer such explanations and statements as may be pertinent to the case. (Copied from General Regulations under the Customs and Navigation Laws, &c., 1884. Printed at the Government Printing Office, 1884, Washington.)

The defendant then asked the judge in the District Court to instruct the jury :—

1. If the defendant attended on the day appointed for the appraisement by the merchant appraiser, and the United States not being ready to go on, and the hearing postponed indefinitely, the defendant was entitled to such reasonable notice of the time and place of holding the appraisement as would enable him to attend.

2. If the United States failed to move in the matter after the adjournment from June, 1883, until March, 1884, and the defendant was then temporarily absent from home, he was entitled to a reasonable time to return and attend at the appointment.

3. If the United States, on proceeding with the reappraisement in the absence of the defendant, under the circumstances, as shown by the testimony, the reappraisement is not a valid merchant's appraisement.

The judge instructed the jury "that such notice was given to the defendant as is contemplated by the regulations of the department and the rules of law governing reappraisements, and that the reappraisement was valid, and that the plaintiff is entitled to recover a verdict for the amount of the claim, $1611.20, with interest," reserving the questions whether the

defendant was entitled to the instructions as asked by him. This sum was the amount claimed over and above the amount paid, upon which the goods had been delivered to Earnshaw.

The said judge, when considering the points reserved, said: "The defendant's only substantial ground of complaint is the appraisers' refusal to adjourn the hearing until a future time.

Proper notice was sent him, in pursuance of which his representative attended and requested an adjournment.* This request was refused. Whether it should have been granted the court cannot consider. The appraisers were the sole judges of this. I cannot assume that they abused their authority—acted arbitrarily—without the exercise of the discretion committed to them, and on this ground treat the appraisement as void. Judgment must therefore be entered on the verdict for the plaintiff.

Whereupon judgment was entered accordingly.

In the Circuit Court the defendant below being the plaintiff in error, assigned errors in the proceeding in the District Court, as follows:—

The plaintiff in error, Alfred Earnshaw, assigns the following errors in the proceedings of the court below:—

1. The court erred in deciding that no one could inquire whether the time given in the notice of the hearing was sufficient, or whether the reason for asking for a postponement was sufficient, and that the discretion of the general appraiser of the United States on this subject was conclusive, whereas the court should have decided and instructed the jury that it was a question of fact, under all the circumstances, whether the notice of the hearing given by the general appraiser of the United States was a reasonable and proper notice.

2. The court erred in not deciding that the notice given by the general appraiser of the United States was not a sufficient one under the circumstances.

3. The court erred in not deciding that the general appraiser of the United States did not exercise a legal discretion in respect of the notice given for the holding of the reappraise-

---

This is a mistake in fact, as the record shows no one attended. A telegram was sent stating the absence, and requesting an adjournment.

ment called by the defendant on the cargoes mentioned in the bill of exceptions.

The court affirmed the judgment of the District Court without explanation or remark.

(MEMORANDUM.—In assigning errors in this court it is not practicable to set out the charge or the ruling, which are the real questions, as they were in the District Court, as the error to be assigned is in the judgment of the Circuit Court. I have, therefore, set out the proceedings in the District Court as they would have been imbodied in the assignments of error had this been a writ of error to that court. The object of the rule of this court, No. 21, III., section 5, is, I believe, thus attained, and, as far as practicable, literally complied with.)

ASSIGNMENTS OF ERROR.

IN THE SUPREME COURT OF THE UNITED STATES.

The court erred in not reversing the judgment of the District Court for the reasons assigned on the record, viz.:—

1. Because the District Court decided that no one could inquire whether the time given in the notice of the hearing was sufficient, or whether the reason for asking for a postponement was sufficient, because the exercise of the discretion of the general appraiser of the United States on this subject could not be inquired into.

2. In ruling that the notice of the hearing given in this case was sufficient.

3. In not deciding that the District Court ought to have decided that the general appraiser of the United States did not exercise a legal discretion, that is, did not exercise his discretion in a legal manner, in respect of the notice given for the holding of the reappraisement called by the defendant on the cargoes mentioned in the bill of exceptions.

R. C. McMURTRIE,
For Plaintiff in Error.

ARGUMENT.

The defendant had paid all that was demanded, saving the increased duties imposed in March, 1884, on goods imported in June–September, 1882. So that the only question was the validity of the reappraisement and the consequent addition of duties under this reappraisement. If that appraisement was not a lawful one the foundation of the claim fell.

On the first trial it was ultimately admitted by the court that the importer was entitled to notice of the reappraisement, and then it became a question whether, under the circumstances, the notice given was reasonable.

The importer had been ready and had attended, but the United States was not prepared to go on nor to fix a time when they would be ready. (Record, page 11, star page 24.) They postponed the hearing indefinitely and for their convenience and on a promise of notice. Nine months after this, on a few days' notice, while defendant was absent temporarily from the country, they determined to go on, disregarding the application for time to permit the return of the defendant.

1. It is insisted, as it was in the court below, that the real question was whether defendant was entitled to notice; for if this be the case the legal consequence is that it must be a reasonable one. There is not an instance that can be produced in which notice is requisite, and reasonableness is not involved.

Obviously the only object of a notice is to enable the person receiving it to protect his interest, and it is mere contradiction to say the law requires notice before the act is done, but it is quite immaterial whether it is possible to avail oneself of it; on the second trial the court came to the conclusion that neither court nor jury could inquire if the notice was reasonable. We submit that if this be the law, the requirement of notice is useless, or, more correctly, that there is no necessity for notice.

The points then seem to be:—

I. Is the importer entitled to notice of a reappraisement?

II. If he is, it must be a reasonable notice, looking to all the circumstances.

III. There is a third point, or rather was one, insisted on by the District Attorney, but to which no attention was paid by the court, viz., could the defendant defend an action for money if brought by the United States, without having first protested against something, (no one was able to say what, but) probably against the assessment of the duty.

1. It is not a necessary deduction from the fact that the question involved is one to be determined by proof or evidence, that we were entitled to notice; but it is important to notice that the case was of an appeal from an assessment, and that the new assessors were to be governed by evidence.

Marriott *vs.* Brown, 9 Howard, 634 S. P.

The statute itself is silent on the subject of when and how this new body is to act. The regulations of the Treasury Department assume that the importer is entitled to be present. It says, article 466 (General Regulations under the Customs and Navigation Laws, &c., 1884, printed at the Government Printing office, 1884, Washington): The appraiser-at-large shall be notified of the appeal, of the time fixed for reappraisement, and of the name of the merchant appraiser. *The importer will be notified of the time and place, but not of the name of the merchant selected.* * * * *The importer or his agent will be allowed to be present, and to offer such explanations and statements as may be pertinent to the case.* Certainly a regulation of the treasury *in favor of the citizen*, and tending to produce justice, is entitled to great weight.

But how have the courts answered the statute? The Supreme Court (Campbell, J.), in Bartlette *vs.* Rowe, 10 Howard, 273, quotes as conclusive on the finality of an appraisement a sentence reading thus, "Because in case the importer is dissatisfied with the valuation made by the appraisers, he is allowed by the act of Congress before paying the duty, *an appeal and further hearing before another tribunal*," and points out that this is the substitute for the usual tribunal, viz., a jury. But the point now under discussion is, are we entitled *to be heard?* To deny this and yet say we have an appeal, and to a tribunal, is manifestly a contradiction, for capacity to attend is, I submit, involved in the right to be heard.

The sentence is quoted from 4 How., 335, and contains in addition these words, which are pregnant, after *tribunal*, "constituted in part by persons of his own selection;" and still further, "these persons have been aptly denominated a species of legislative referees," citing 2 Mason, 406. The conduct of these appraisers is inquirable into on the question of the validity of their appraisement. Greeley *vs.* Burgess, 18 How., 415.

It is assumed that nothing further is required to prove that the importer is entitled to notice of the reappraisement, and the appraisers are performing a judicial function.

2. Notice of a hearing at which evidence is to be given and a fact ascertained by a *tribunal*, which affects the interests of the person entitled to the notice, means such notice as will enable him to protect his interests.

It was supposed this was a legal corollary of the first proposition. But the court on consideration thought they had been mistaken in this, and that the mode and time of notice was intrusted to the caprice of the appraiser. A discretion not inquirable into is a caprice, so far as third persons are concerned.

If this be so, it is the one exceptional case. I, at least, am not aware of another instance in which a person intrusted by law to do such a thing can assert that this discretion cannot be inquired into. The most common instance is that of a trustee, and we all know this does not mean his capricious determination. Hill on Trustees, 494–5; 3 Madd., 491; 39 Ch. Div., 446; and by no one is the point better stated than by Chancellor Dessassure.

Harper's Eq., 118; Haynesworth *vs.* Cox.

The authorities collected by Judge Brown, of the Southern District of New York, in a recent case, seem to render further discussion useless. He cites from 4 Inst., 41, *Discretio est discerner per legem quid est justum.* In Rooke's Case, 3 Rep., 99–100, it is said, "Notwithstanding the words of the commission give authority to the commissioners to do according to their discretion, yet their proceedings ought to be limited and

bounded by the rule of reason and law;" and this was approved by Lord Mansfield and Wilmot, J., in Rex *vs.* Peters, 1 Burr., 568–70. Then he cites a case precisely in point, where it was decided that the discretionary power of adjournment must be exercised reasonably, otherwise the proceedings will be set aside on *certiorari*, though ordinarily such discretion is not the subject of review.

Rose *vs.* Stuyvesant, 8 John., 427.

The reason here was the sickness of a child preventing the father attending.

The President *vs.* Patchin, 8 Wend., 47: "Palpable injustice in the exercise of a *discretionary* power may always be corrected on *certiorari*."

These citations by Judge Brown leave nothing to be said. I may add, they are in accord, however, with the English and the authorities of other States.

Passmore *vs.* Petit, 4 Dall, 271; Frey *vs.* Vanlear, 1 Serg. & Raw, 435.

The language of Mr. Justice Field, U. S. *vs.* Kirby, 7 Wallace, 486–7, is very applicable, and the reasoning parallel. A statute making it penal to detain a mail-carrier contains an exception by implication that this may be done if he has committed a felony. "*In general, terms should be so limited in their application as not to lead to injustice, oppression, or an absurd consequence.*"

The court here, in their opinion or charge, plainly intimate that they have no jurisdiction to avoid an act, though they see that it was harsh, unreasonable, and useless for the purpose intended by the law. This is certainly not the rule of the common law. When a statute takes away the remedy, by *certiorari* it always remains to correct a judge who has refused to act for want of power, if, in fact, by law he had the power.

14 Queen's Bench, 63; Reg. *vs.* Grant.

If, then, the court had the power or jurisdiction to decide that the defendant was entitled to notice of the hearing or

appraisement, they had, of necessity, a power to determine whether what was given was legal notice. As they declined because their jurisdiction does not extend to that, the cause must be reversed, unless this court differs from the judge in thinking the notice was sufficient. Was this so? We rely on the circumstances.

1. The cargo had been delivered, and time was quite immaterial. 2. The Government was seeking to correct an error made by one of its officers. 3. The defendant had attended the meeting, when the United States, not being prepared, and not being able to say when they would be prepared, put off the meeting with a promise to notify, and at the end of nine months, having fixed on a day, refused to change it, though the defendant had left home to return shortly. 4. It was not pretended that the desired delay was any disadvantage to the United States. And if they could wait, as they had done, from September 1882, when the importation was made (page 3), to March, 1884, when the appraisement was had, there should be some reason for refusing to continue the case till May, to enable the defendant to attend.

3. It was also insisted by the District Attorney that we were not entitled to be heard, as we had not protested. The court disregarded this, and rightly. There is not a pretense for demanding such a preliminary. A protest is required only to prove that a payment is not voluntary, and it has no other object, purpose, or effect.

> 2 Sm. Sel. Lea. Ca., 456. Note to Marriott *vs.* Hampton, citing four authorities.

In fact, the point is decided in U. S. *vs.* Schlesinger, 120 U. S., 109; reaffirmed, Porter *vs.* Beard, 124 U. S., 429, 433. When the court points out that protest can only be made where the duties are paid *before* delivery of the cargo, and hence, under the statute suit to recover back money paid can only be maintained for payment under those circumstances. But (as here) where the goods have been delivered the only remedy, when a larger sum is demanded, is *by defending the suit.*

No statute or rule of the common law requires a protest to entitle a man to defend an unjust suit.

At what time were we to protest, and against what? The goods had been delivered and we had paid the duties; the United States said they had made a mistake and sued us for the amount they say we ought to have paid. To require a protest against the appraisement is absurd, for the only point in the case is that we had no notice of there being one. To say they can recover anything they see fit to demand, unless we have protested against their claim, is a misconception of the rule. When a demand is made as a condition to set one at liberty, or to free goods from restraint, the payment may be compulsory or voluntary. To prevent dispute as to the fact, it is usual to protest that the payment is compulsory; but it is only evidence of compulsion.

2 Smith, *ut sup.*

This court has now settled that all this law as to protest, so far as respects the customs, is regulated by statute.

Arnson *vs.* Murphy, 109 U. S., 238.

There has been no legislation as to defenses to an action or debt that rests on illegal acts as the evidence of its existence.

It is impossible to read the statute and not see that there is no room for a protest except when a payment is to be made by compulsion by the detention of the goods. (Revised Statutes, section 3011.) *Any person who shall make payment under protest*, &c. To impose it as a condition of defending an illegal claim is entirely without warrant, for the United States differs not in this respect from a private person.

R. C. McMURTRIE,
For Plaintiff in Error.

Additional authority to those cited, pages 6 and 7 of brief in Earnshaw *vs.* W. S., S. C. U. S., Oct. 1889, 339.

Cooper *vs.* W. Board of Works, 13 C. B., N. S., 180. The question being whether a board vested with authority to demolish a house if certain regulations were not complied with were bound to give the owner notice before making an order. Willes, J., said (page 190): "I apprehend that a tribunal which is by law invested with power to affect the property of one of her majesty's subjects is bound to give such subject an opportunity to be heard before it proceeds, and that the rule is of universal application and founded on the plainest principles of justice." Then he says the board is such a tribunal whether looking at the discretion vested in it or to the analogy which exists between it and other recognized tribunals. Then on page 198 he points out that there was to be a hearing on an appeal, hence "*a fortiori* in the first instance;" and on page 193 he says it is absurd to say the man shall be heard in the suit for the costs, but not heard on making the order that authorizes the suit for costs.

Byles, J., page 194, is to the same effect: whether the board acted judicially or ministerially; and Keating, J., on page 196, that a right to be heard was implied from the fact that a judgment was to be formed as to the extent of the demolition or alteration that was necessary.

This decision does not rest on any right given by the statute, but on the principles of justice applicable to all cases where the rights of others are being dealt with.

Vestry of St. James *vs.* Feary, 24 Queen's B., Div. 709.